LIBRARY
U. S.

Office-Supreme Court, U.S.
FILED
JUL 1 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 231

In the Matter
of
ITEMLAB, INC.,
Bankrupt.

EIGHTEENTH AVENUE LAND CO.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SEYMOUR H. KLIGLER,
120 Broadway,
New York 4, N. Y.,

CARL A. BINDER,
HAROLD J. STANGLER,
LEO SILBER,
333 Eagle Avenue,
West Hempstead, N. Y.,
Counsel for Petitioner.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	2
Statement	3
A. Prior Proceedings	3
B. The Events Giving Rise to This Petition	4
Reasons for Granting Writ	5
Conclusion	7
Appendix A—Fifth Amendment and Excerpts From Applicable Statutes and Rules	9
Appendix B—Order of United States Court of Appeals, Dated March 6, 1964	17
Appendix C—Order of United States Court of Appeals, Dated April 3, 1964	18

Case Cited

In Re Gibraltor Amusement Ltd. (C. A. 2, 1961), 291 F. 2d 22, cert. den. 368 U. S. 925	6

Constitutional Provision, Statutes and Rules Cited

Fifth Amendment	1
11 U. S. C. General Order 47 following Section 53 (30 Stat. 544 revised by 52 Stat. 883)	6
28 U. S. C. Sec. 1291 (62 Stat. 991)	5
28 U. S. C. Rule 73 (62 Stat. 991)	3, 5
Rule 14 of the Rules of the United States Court of Appeals for the Second Circuit	4, 5, 6
New York Corporation Law: Sections 16 and 17	3

IN THE

Supreme Court of the United States

October Term, 1964

No.

In the Matter

of

ITEMLAB, INC.,

Bankrupt.

EIGHTEENTH AVENUE LAND CO.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit dated March 6, 1964 and the order of said Court dated April 3, 1964 denying a petition for rehearing.

Opinion Below

The orders in the Court below were entered without opinion and are not reported. The orders are printed in appendices B and C, *infra.*

Jurisdiction

The order of the Court of Appeals dated March 6, 1964 granted Petitioner's motion to docket the record on appeal but dismissed the appeal on the ground that the appeal was without merit (Appendix B, *infra,* p. 17). The

Order dated April 3, 1964 denied petitioner's petition for a rehearing of the motion (Appendix C, *infra*, p. 18).

The jurisdiction of this Court is invoked under 11 U. S. C. § 47(C) and 28 U. S. C. § 1254(1).

Questions Presented

(1) Whether the dismissal on the merits of the Petitioner's appeal to the United States Court of Appeals for the Second Circuit without a review of the record below was a complete departure from the accepted and usual course of judicial proceedings.

(2) Whether the United States Court of Appeals for the Second Circuit violated 28 U. S. C. 1291 and Rule 73 by granting leave to Petitioner to docket its record on appeal pursuant to Rule 14(b) of the Rules of the said Court and then, by the same order, dismissing the appeal on the merits without the required review of the appeal.

(3) Whether under Amendment 5 to the Constitution of the United States, Petitioner was deprived of due process of law by the determination of the Court of Appeals that there was no merit to Petitioner's appeal without reviewing the record on appeal and by refusing Petitioner the opportunity to present to said Court its contentions supported by authority and argument in relation to the record.

Constitutional Provisions, Statutes and Rules Involved

The constitutional provision involved is the Fifth Amendment to the Constitution. The statutes involved are the Act of July 1, 1898, ch. 541, 30 Stat. 544, revised by Act of June 22, 1938, ch. 575, 52 Stat. 883, 11 U. S. C. General Order 47 following Section 53; the Act of June 25, 1948, ch. 646, 62 Stat. 991, 28 U. S. C. Sec. 1291 and Rule

73; Rules of the United States Court of Appeals for the Second Circuit, Rule 14; New York Laws of 1923, ch. 787, as amended, Stock Corporation Law, Sections 16 and 17. The Fifth Amendment and the pertinent provisions of these statutes and rules are printed in Appendix A, *infra*.

Statement

A. Prior Proceedings:

On March 16th, 1961, an order of the Referee in Bankruptcy of the United States District Court, Eastern District of New York, was entered denying the petition of the Bankrupt (then as Debtor-in-Possession) which sought to declare a certain chattel mortgage executed by the Bankrupt to the Petitioner on August 19th, 1960 void and unenforceable on the ground that there was not the necessary consent to the execution of the mortgage by at least two-thirds of the total number of shares outstanding to vote on such question (New York Stock Corporation Law, Section 16, subd. 1, Appendix A, *infra*, p. 14). The Referee found that the officers of the Bankrupt executed and recorded a certificate that the execution of the said mortgage had been duly consented to by the stockholders and that such certificate was conclusive evidence of stockholder's consent in favor of the Petitioner on the ground that the Petitioner, in good faith, received for value the Bankrupt's promissory note secured by the said mortgage (New York Stock Corporation Law, Section 17, Appendix A, *infra*, pp. 15, 16).

The Bankrupt then petitioned the District Court for a review of the Referee's order and decision. The District Court reversed the order of the Referee and recommitted the matter to him for further hearings to adduce and elicit additional evidence concerning the issues of good faith and value.

Petitioner appealed to the United States Court of Appeals for the Second Circuit from the said order, but

said appeal was dismissed on the ground that it was not taken from a "final order." The matter was remanded to the Referee to conduct the hearings as required by the order of the District Court.

B. The Events Giving Rise to This Petition:

Upon the second hearing before the Referee in Bankruptcy, there was additional testimony and documentary evidence submitted. The Referee again concluded that the Petitioner was entitled to the protection afforded by Section 17 of the New York Stock Corporation Law on the ground that the Petitioner had acted in good faith in the execution of the mortgage and had paid valuable and fair consideration, which was received by the Bankrupt.

The Trustee in Bankruptcy petitioned for review of the Referee's order and on October 7th, 1963 an order was entered by the District Court granting the petition and declaring the mortgage to be void and unenforceable. The said order was predicated upon the decision of the District Court, Dooling, *J.*, which made findings of fact contrary to those of the Referee on the question of the Petitioner's good faith.

On November 6th, 1963, Petitioner duly served and filed a notice of appeal from said order to the United States District Court, for the Second Circuit, together with its bond on appeal.

Because of the illness of counsel, the record on appeal and docket entries as required by 28 U. S. C. Rule 73(g) was not filed until December 17th, 1963—one day late.

Thereafter, Petitioner applied to the Court of Appeals for an enlargement of time to docket the record on appeal pursuant to Rule 14(b) of the Rules of that Court on the ground of counsel's excusable neglect and that a substantial question was to be presented upon the appeal (Appendix

A, *infra*, pp. 12, 13). Petitioner's motion was denied by order dated January 31st, 1964.

Thereafter, and on a second petition for rehearing, the Court of Appeals entered an order on March 6th, 1964 vacating the order of January 31st, 1964 and granted leave to file the record on appeal. However, the said order further provided "The Appellee having suggested in its papers that the appeal is frivolous and the Appellant's papers disclosing that there is no merit to the appeal, the appeal is dismissed" (Appendix B, *infra*, p. 17).

Upon the entry of said order, a petition for a rehearing was filed but was denied by order of the Court of Appeals dated April 3rd, 1964 (Appendix C, *infra*, p. 18).

Reasons for Granting Writ

(1) Upon the entry of the order of the United States District Court for the Eastern District of New York reversing the Referee-in-Bankruptcy and adjudicating the chattel mortgage invalid, Petitioner had the clear right to appeal from said order to the United States Court of Appeals for the Second Circuit. The order was final and dispositive of the question of the validity of the chattel mortgage (28 U. S. C. Sec. 1291, Appendix A, *infra*, p. 9).

The jurisdiction of the Court of Appeals was perfected by the timely filing of the notice of appeal and bond for costs within thirty days from the entry of the order appealed from. The failure of an appellant to take any steps concerning the appeal cannot affect the validity of the appeal. Delay in docketing of the record may be grounds for such remedy as provided by the Appellate Court. (28 U. S. C. A., Rule 73(a), (b), (c), Appendix A, *infra*, pp. 10, 11).

The Court below established by rule its criteria for an extension of the time to docket the record on appeal after

the statutory time has expired. (Rule 14(a), (b) of the Rules of the United States Court of Appeals for the Second Circuit, Appendix A, *infra*, pp. 12, 13.) By its order of March 6, 1964 whereby the record on appeal was permitted to be docketed, the Court determined that its criteria had been met by Petitioner, i.e., that there was excusable neglect in failing to docket the record within the statutory period of time and a substantial question was to be presented on appeal. At that juncture Petitioner was entitled to a complete, statutory review of its appeal. Notwithstanding, the Court proceeded to decide the merits of the appeal solely on the affidavits submitted on the motions and found against Petitioner, on the merits, dismissing the appeal. In effect, this was an affirmance of the order sought to be reviewed.

The decision, therefore, was not based upon a review of the record below, in that said record was not yet docketed with the Court of Appeals. Illustrative of the importance of review of the record to determine the merits of the appeal is one of the substantial questions that was involved, to wit, the power of the District Court, on a petition to review an order of the Referee in Bankruptcy, to overrule findings of fact made by the Referee from evidence adduced at hearings conducted by him. The Referee's findings of fact can only be disturbed where they were "clearly erroneous" or where there is cogent evidence of mistake or miscarriage of justice, or where there was no credible evidence on which the referee could come to his decision (11 U. S. C. General Order 47 following Section 53; *In re Gibraltor Amusement Ltd.* (C. A. 2, 1961), 291 F. 2d 22, cert. den. 368 U. S. 925). Thus, it become essential, for the proper review, that the record be before the Appellate Court. The determination of that question without the record could not be made.

(2) By the unusual disposition of the appeal, the Court below has effectively prevented and deprived Petitioner of any possibility of review by this Court of the merits and unique questions posed in this case.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SEYMOUR H. KLIGLER,
120 Broadway,
New York 4, N. Y.,

CARL A. BINDER,
HAROLD J. STANGLER,
LEO SILBER,
333 Eagle Avenue,
West Hempstead, N. Y.,

Counsel for Petitioner.

Dated: June 30, 1964.

APPENDIX A

(Fifth Amendment and Excerpts From Applicable Statutes and Rules)

Amendment V to the Constitution of the United States: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

11 U. S. C. General Order 47 following Section 53
Reports of Referees and Special Masters

Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

28 U. S. C. Sec. 1291
Final Decisions of District Courts:

The Courts of Appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U. S. C. Rule 73. Appeal to a Court of Appeals

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the dis-

trict court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

(c) Bond on Appeal. Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk. As amended Dec. 29, 1948, effective Oct. 20, 1949.

(g) Docketing and Record on Appeal. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the appeal there docketed within 40 days from the date of filing the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order, but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal. As amended Dec. 27, 1946, effective Mar. 19, 1948.

U. S. Court of Appeals—Rule 14. Docketing Cases

(a) Time Within Which Record Must be Filed. In appeals in civil and admiralty cases the appellant shall docket the action and file the record in this court within 40 days after filing the notice of appeal with the district court, or within any added time granted by the district judge within 40 days after the filing of the notice of appeal, but in no case later than 90 days after such filing [Rule 73(g) of the Federal Rules of Civil Procedure]. In an appeal in a criminal case the appellant shall docket the case and file the record within the time fixed by Rule 39 of the Federal Rules of Criminal Procedure. If the record is not presented to the clerk for filing within the periods above provided, he shall refuse to accept it unless so ordered by this court or a judge thereof if this court is not in session, or an order on consent has been or is being entered as provided in Rule 29(9).

(b) Motion to File Record. This court will not hear and grant motions for filing and docketing appeals, other-

wise properly taken, at times other than as stated in subdivision (a) hereof, except upon a showing by affidavits, or otherwise as the court may order, (1) that the delay has been due to causes beyond the control of the moving party, or (2) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal, and (3) in all cases where the district court has power to act, that an extension of time has been denied by that court, together with the grounds for such denial, if any are stated.

(c) Dismissal by the Clerk. If the appellant shall have failed to comply with this rule, any appellee may either docket the action and file the record in this court, in which event it shall stand for argument, or have the action dismissed by the clerk of this court upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, certifying that such appeal has been duly taken or allowed, and proof that 4 days' notice in writing has been served on the appellant or his attorney that application will be made to the clerk of this court for such dismissal. No action dismissed under this rule shall be reinstated except in the discretion of the court and upon a showing similar to that required under subdivision (b) hereof.

(d) Dismissal on Consent. Whenever the appellant and appellee by their attorneys of record shall sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due him, the clerk shall enter the case as dismissed and shall give a copy of the agreement filed to any party requesting it. Dismissal under this rule shall not be necessary where an appeal has not been docketed and the court from which the appeal has been taken has dismissed the appeal on stipulation of the parties or upon motion and notice by the appellant.

New York Stock Corporation Law § 16. Power to borrow money and mortgage property

1. Every stock corporation other than a moneyed corporation shall have the power to borrow money and contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation; and it may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for such purposes. The consent to the execution of such mortgage, except a purchase-money mortgage, by the holders of not less than two-thirds of the total number of shares outstanding entitled to vote thereon, given either in writing, or by vote at a meeting of the stockholders called for that purpose in the manner prescribed by section forty-five, shall be required. If the property to be mortgaged consists of real estate, a certificate that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed, acknowledged and verified by the president or a vice-president and by the secretary or an assistant secretary of the corporation, and shall be recorded in the office of the recording officer of each county within the state in which the mortgage is filed or recorded, or, if no part of the mortgaged property be located within the state, shall be filed in the office of the clerk of the county wherein the office of the corporation is located. If the property to be mortgaged consists of chattels, such certificate shall be filed in the office of the recording officer of each county within the state in which the chattel mortgage is filed, or, if no part of the mortgaged chattels be located within the state, in the office of the clerk of the county wherein the office of the corporation is located. When authorized by like consent, the directors, under such regulations as they may adopt, may confer on

the holder of any debt or obligation, secured or unsecured, the right to convert the principal thereof within such period and upon such terms and conditions as may be fixed by the resolution of the directors conferring the right of conversion, into stock of the corporation • • •.

New York Stock Corporation Law § 17. Validating corporate mortgages

Whenever any mortgage affecting property or franchises within this state heretofore or hereafter executed by authority of the board of directors in behalf of any stock corporation, domestic or foreign, other than a moneyed corporation, recites or represents that the execution of such mortgage has been duly consented to or authorized by stockholders, such recital or representation in any such mortgage, duly recorded within this state, shall be presumptive evidence that the execution of such mortgage has been duly and sufficiently consented to and authorized by stockholders as required by any provision of law. After any such mortgage heretofore or hereafter shall have been recorded for more than one year in one or more of the counties of this state wherein the mortgaged property or any part thereof is located, and the corporation shall have received value for the obligations actually issued under and secured by such mortgage, and interest shall have been paid on any of such obligations according to the terms thereof, such recital or representation of such mortgage so recorded shall be conclusive evidence that the execution of such mortgage has been duly and sufficiently consented to and authorized by stockholders as required by any provision of law, and its validity shall not be impaired by reason of any defect or insufficiency of consent or authority of stockholders or in filing or recording such consent or authority, and such mortgage shall be valid and binding upon the corporation, and those claiming under it, as security for all valid obligations issued or to be issued thereunder, unless such mortgage shall be

adjudged invalid in an action begun as hereinafter, in this section, provided. The invalidity of any such mortgage hereafter recorded, because of insufficiency of consent by stockholders, may be adjudged in any action for such purpose, brought in any county in this state wherein the mortgaged property or any part thereof is located, within one year after the earliest record of such mortgage in this state. In any such action the recitals or representations of the mortgage shall be presumptive evidence only. Whenever hereafter, in compliance with any law of this state, the officers of any corporation shall have made and filed and recorded a certificate that the execution of a mortgage hereafter made by the corporation has been duly consented to by stockholders, such certificate shall be conclusive evidence as to the truth thereof, in favor of any and all persons who in good faith shall receive or purchase, for value, any obligation purporting to be secured by such mortgage. Nothing in this section shall affect a remedy in respect to any such right accrued before this enactment, nor shall it dispense with the necessity of obtaining the consent of the public service commission or transit commission having jurisdiction thereof to any mortgage by a railroad corporation.

APPENDIX B

(Order of United States Court of Appeals, Dated March 6, 1964)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of March, one thousand nine hundred and sixty-four.

Present:

HON. STERRY R. WATERMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

In the Matter of

ITEMLAB, INC.,

Bankrupt,

EIGHTEENTH AVENUE LAND CO.,

Appellant.

A motion having been made herein by counsel for appellant for leave to file a second petition for rehearing.

Upon consideration thereof, it is

ORDERED that the order of January 31, 1964, denying the motion for leave to file the record and dismissing the appeal, be and it hereby is vacated.

FURTHER ORDERED that leave to file the record today be and it hereby is granted.

FURTHER ORDERED that the appeal from the order of the United States District Court for the Eastern District of New York, be and it hereby is dismissed for frivolousness with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

(Order of United States Court of Appeals, Dated April 3, 1964)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circiut, held at the United States Court House, in the City of New York, on the third day of April, one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

In the Matter of

ITEMLAB, INC.,

Bankrupt,

EIGHTEENTH AVENUE LAND CO.,

Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

ORDERED that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.